

1 THE HONORABLE THOMAS S. ZILLY
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10 UNITED STATES DISTRICT COURT
11 FOR THE WESTERN DISTRICT OF WASHINGTON
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14 BUNGIE, INC., a Delaware corporation,
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16 Plaintiff
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18 v.
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20 AIMJUNKIES.COM, a business of unknown
21 classification; PHOENIX DIGITAL GROUP
22 LLC, an Arizona limited liability company;
23 JEFFREY CONWAY, an individual; DAVID
24 SCHAEFER, an individual; JORDAN GREEN,
25 an individual; and JAMES MAY, an individual,
26
27 Defendants.
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Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' SURREPLY IN
OPPOSITION TO
PLAINTIFF'S MOTION TO
STRIKE EXPERT
TESTIMONY OF BRAD
LAPORTE**

15 For reasons stated herein, Defendants, by and through their undersigned counsel,
16 respectfully request that the Court strike the supplemental declaration of William Rava
17 (DKT#214) and Exhibit 4 attached thereto (DKT#214-1). Defendants further request that this
18 Court strike Bungie's argument at pages 1-3 of its Reply Brief (Dkt#213) that, "Defendants
19 and LaPorte Concede That Certain LaPorte Opinions Are Not Relevant to the Only
20 Remaining Counterclaim."

21 **INTRODUCTION**

22 Admitting that its Reply raises new arguments not raised in its initial motion, Bungie
23 hopes to gloss over this undeniable fact with a footnote stating, "Because the Court dismissed
24 Defendants' counterclaims after Bungie filed its Motion regarding LaPorte, *Bungie could not*
25 *have included this argument in its original Motion*. Bungie would not oppose a request by
26 Defendants to file a surreply limited to addressing this new argument." (Emphasis supplied.)
27 This is nonsense and the Court should neither be fooled nor permit Bungie to engage in such
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1 blatant sophistry and dishonesty. There is absolutely no reason these new arguments could
 2 not have been raised in Bungie's opening brief, and it purported excuse is baseless.

3 In point of fact, the *only* thing that changed as a result of this Court's rulings on the
 4 counterclaims is that Mr. May's first three counterclaims were dismissed. His remaining
 5 fourth counterclaim has been part of this case since it was filed nearly one year ago on
 6 November 21, 2022 and has not changed since then. *Nothing* in this Court's order dismissing
 7 Mr. May's first three counterclaims changes *anything* in Mr. May's remaining fourth
 8 counterclaim, and there is absolutely no reason whatsoever the new arguments made by
 9 Bungie in its Reply could not have been made earlier. Mr. LaPorte served his expert report
 10 and appeared for deposition within the time frame specified by this Court and well before this
 11 Court's October 12, 2023 deadline for challenging Mr. LaPorte's testimony as an expert.

12 Bungie's statement that it will not oppose a surreply on the part of Defendants does
 13 not, and cannot change the fact that Bungie was ordered by this Court to file *all* challenges to
 14 Mr. LaPorte's testimony by October 12, 2023. Again, Bungie had all information needed to
 15 make the very arguments that it admits it made for the first time in its Reply. Permitting
 16 Bungie to maintain these clearly untimely arguments in view of its calculated and cynical
 17 "gracious" offer to permit a surreply not only increases the effort and expense imposed on
 18 Defendants but thumbs its nose at this Court by effectively extending the deadline the Court
 19 imposed for filing all challenges to expert testimony.

20 It is telling that after reliably informing this Court that, "It is well-established in this
 21 Court that '[a]rguments cannot be raised properly for the first time on reply,'" citing
 22 *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1171 (W.D. Wash. 2010); *AT & T Mobility*
 23 *LLC v. Holaday-Parks-Fabricators, Inc.*, No. C10-468Z, 2011 WL 5825714, at *2 (W.D.
 24 Wash. Nov. 17, 2011) (Zilly, J.), Bungie has now twice engaged in the very conduct for
 25 which it once demanded this Court sanction Defendants. Bungie's blatant demands for a
 26 double standard are strong and clear.

ARGUMENT

Bungie's argument that Mr. LaPorte was not retained to provide expert testimony on Mr. May's behalf is baseless.

In Section B of his report entitled, “Scope of Engagement,” Mr. LaPorte states that he was retained, in part, “to review documents and potentially write one or more reports and/or declarations and to testify as an expert witness in this action with regard to ... (3) whether Bungie appears from the evidence I reviewed to have accessed certain private files on the computer of James May (“Mr. May”).” Bungie’s claim that, “Defendants and LaPorte Concede That Certain LaPorte Opinions Are Not Relevant to the Only Remaining Counterclaim.” is not only unsupported, it is false.

Mr. May’s fourth counterclaim, which specifically “reasserts and incorporates the allegations set forth in [the preceding] counterclaim paragraphs,” further specifically alleges that, “By intentionally exceeding the terms of the express authority provided to Bungie by Mr. May, Bungie engaged in theft of Mr. May’s private computer data.” Mr. LaPorte’s stated and expected testimony goes directly to whether the data admittedly accessed by Bungie¹ concerns private computer data resident on Mr. May’s computer. As such, his testimony, which restates and agrees with the prior testimony of Defendants’ earlier expert, Mr. Scott Kraemer, is neither new nor irrelevant. There has been no “concession” by *anyone* that Mr. LaPorte’s testimony is not relevant to the remaining counterclaim of Mr. May. And again, there is absolutely no reason the challenges raised for the first time by Bungie in its Reply could not have been raised before. Bungie is again attempting a blatant end run around clearly established applicable rules.

1 Again, this comes directly from a document produced by Bungie itself identifying, in part, more than one-hundred files Bungie, or someone acting on Bungie's behalf, accessed and downloaded from Mr. May's personal computer.

1 Bungie's claim that it is only seeking to limit parts of Mr. LaPorte's testimony is
 2 equally baseless and deceptive.² Indeed, Bungies' Proposed Order (DKT#199-1) at Paragraph
 3 A and C expressly seeks to bar, "Any opinions or testimony" from Mr. LaPorte regarding
 4 exhibits C and D of Mr. May's amended counterclaim, which documents are themselves
 5 central to Mr. May's remaining counterclaim. Furthermore, and despite Bungie's claim in
 6 its Reply that Defendants somehow misunderstood Bungie's motion (they did not) and failed
 7 to recognize that Bungie sought only to bar *parts* and not *all* of Mr. LaPorte's testimony,
 8 Bungies' Reply states, in no uncertain terms, that, "Bungie respectfully requests that the Court
 9 exclude Brad LaPorte's testimony *entirely...*" (DKT#213, p. 5, emphasis supplied.) Such
 10 transparent chicanery should neither be accepted nor condoned by this Court.

11 **CONCLUSION**

12 For all the foregoing reasons, Defendants respectfully request that the Supplemental
 13 Declaration of William Rava and Exhibit 4 attached thereto be stricken along with the
 14 arguments made at pages 1-3 of its Reply Brief (DKT#213). Such action by this Court is
 15 respectfully requested.

16 Dated November 2, 2023.

17 /s/ Philip P. Mann

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 26 I certify that this memorandum contains 1267 words, in compliance with the Local
 27 Civil Rules.

28 2 To the extent Mr. LaPorte attempts to testify at trial regarding irrelevant matters or beyond the
 29 scope permitted by this Court, such can be addressed by way of appropriate objections. Neither Defendants nor
 30 Mr. LaPorte intend to introduce any improper testimony at trial.